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UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

- - -
HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE PRESIDING
- - -

SMARTMETRIC INC.,)
)
PLAINTIFF,)
)
VS.) CV 11-7126
)
MASTERCARD INTERNATIONAL, INC.,)
)
DEFENDANT.)
_____)

HEARING RE SEALED FILINGS

LOS ANGELES, CALIFORNIA
MARCH 25, 2013

ROSALYN ADAMS, CSR 11794
FEDERAL OFFICIAL COURT REPORTER
312 NORTH SPRING STREET, ROOM 410
LOS ANGELES, CALIFORNIA 90012
(213) 894-2665

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

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ON BEHALF OF DEFENDANT:

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SHEPPARD MULLIN RICHTER AND HAMPTON, LLC
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1 LOS ANGELES, CALIFORNIA; MONDAY, MARCH 25, 2013; 10:00 AM

2 --000--

3
4
5 THE CLERK: CALLING ITEM NUMBER SIX, CASE NUMBER CV
6 11-7126-MWF: SMARTMETRIC INC. V. MASTERCARD INTERNATIONAL
7 INCORPORATED, ET AL.

8 COUNSEL, PLEASE STATE YOUR APPEARANCE FOR THE
9 RECORD.

10 MR. BRIGHT: GOOD MORNING, YOUR HONOR. PAT BRIGHT
11 FOR THE PLAINTIFF.

12 THE COURT: GOOD MORNING.

13 MR. MELNIK: GOOD MORNING, YOUR HONOR. JIM MELNIK
14 FROM JONES DAY FOR THE DEFENDANT, VISA, INC.

15 THE COURT: GOOD MORNING.

16 MR. CLARK: GOOD MORNING, YOUR HONOR. GARY CLARK
17 FOR SHEPARD MULLIN FOR DEFENDANT, MASTERCARD.

18 THE COURT: TWO ISSUES TO RAISE THIS MORNING. ON
19 AN UNDER SEAL FILING, THE APPROACH I TAKE IS THE ONE WHICH
20 THE FIRST AMENDMENT COMMANDS THAT I TAKE, AND IT'S --
21 ACTUALLY, IT'S CERTAINLY THERE IN NINTH CIRCUIT LAW, ALTHOUGH
22 I DO THINK IT'S MORE CLEARLY EXPRESSED IN THE CALIFORNIA
23 RULES OF COURT WHICH IS THAT DISCOVERY CAN BE SUBJECT TO A
24 PROTECTIVE ORDER, YOU CAN MARK IT HIGHLY CONFIDENTIAL OR
25 CONFIDENTIAL OR WHATEVER, BUT THAT HAS NO BEARING ON WHETHER

1 A MOTION FOR ADJUDICATION GETS TO BE FILED UNDER SEAL.
2 THAT'S AN ENTIRELY SEPARATE THING. AND IT COULD BE THAT
3 DOCUMENTS, ESPECIALLY IN A CASE LIKE THIS, WHERE THERE MIGHT
4 BE TRADE SECRETS OR OTHERWISE PROPRIETARY DO DESERVE TO BE
5 FILED UNDER SEAL EVEN IN REGARD TO A SUMMARY JUDGMENT, BUT
6 THAT WOULD HAVE TO BE ESTABLISHED; AND EVEN IF IT IS
7 ESTABLISHED, SURELY THE ENTIRE MOTION DOES NOT FILED UNDER
8 SEAL. IT'S GOT TO BE ONLY THOSE PORTIONS WHICH ARE DIRECTLY
9 RELATED TO THE UNDER SEAL -- TO THE INFORMATION PROPERLY
10 SEALED TO BE UNDER SEAL AND THEN A REDACTED VERSION SHOULD BE
11 FILED PUBLICLY. THE POINT IS IT'S NOT WHAT THE PARTIES WANT,
12 IT'S NOT WHAT THE LAWYERS WANT, IT'S NOT EVEN WHAT I WANT.
13 WHAT YOU'VE GOT TO ASSUME IS THAT THIS IS THE MOST EXCITING,
14 SEXY, IMPORTANT CASE IN THE WORLD AND THE *L.A. TIMES* WANTS TO
15 GET EVERY SCRAP OF INFORMATION THAT IT POSSIBLY CAN AND IS
16 PREPARED TO FILE A PETITION FOR WRIT OF MANDAMUS IF IT
17 DOESN'T GET IT. THAT'S WHAT THE CONSTITUTION DEMANDS AND
18 THAT'S WHAT'S GOING TO HAPPEN. SO I'M HAPPY TO PROTECT THE
19 INTERESTS OF THE PARTIES BY SEALING THOSE THINGS WHICH
20 LEGITIMATELY ARE SEALED UNDER NINTH CIRCUIT LAW, BUT APART
21 FROM THAT THEN EVERYTHING ELSE HAS TO BE PUBLIC.

22 NOW, IN REGARD TO THE MOTION, THE EX PARTE
23 APPLICATION TO THAT WAS FILED IN THE FLURRY OF EX PARTE
24 APPLICATIONS. THIS ONE BY THE DEFENSE, I INTEND TO DENY IT
25 WITHOUT PREJUDICE. THE REAL ISSUE THAT YOU'RE RAISING IS

1 SOMETHING THAT CAN BE RAISED IN YOUR OPPOSITION TO THE
2 SUMMARY JUDGMENT MOTION. YOU CAN JUST SAY, "LOOK, WE ARE
3 OBJECTING TO THIS DECLARATION BECAUSE THE DECLARATION DOES NO
4 MORE THAN" -- THIS IS MY UNDERSTANDING OF WHAT YOUR EX PARTE
5 APPLICATION REALLY IS -- "THE DECLARATION IS NO MORE THAN A
6 PARROTING OF AN EXPERT REPORT WHICH, UNDER MY SCHEDULE OR THE
7 COURT'S SCHEDULING ORDER SHOULDN'T EXIST. SO, IF THAT'S YOUR
8 POINT, THEN I THINK THAT CAN BE MADE AS AN OBJECTION WHEN THE
9 SUMMARY JUDGMENT MOTION IS PROPERLY ON FILE. AND I ALSO
10 THINK THAT, APART FROM THAT, WHAT YOU SHOULD HAVE DONE WAS
11 FILE A MOTION TO STRIKE IT AND THEN FILE AN EX PARTE
12 APPLICATION FOR SOME SORT OF ORDER SHORTENING TIME. YOU,
13 YOURSELVES, HAVE BEEN REMINDING ME ABOUT THE *MISSION* CASE AND
14 SAYING THAT THINGS SHOULD NOT BE BROUGHT EX PARTE THAT DON'T
15 NEED TO BE BROUGHT. I DON'T SEE THAT THIS NEEDS TO BE
16 BROUGHT EX PARTE. THE WORSE THAT WILL HAPPEN IS THAT --
17 BECAUSE IF YOUR REAL POINT IS THAT THERE ISN'T A WHOLE LOT
18 BEHIND THE SUMMARY JUDGMENT MOTION OTHER THAN THIS
19 DECLARATION, I HAVE ONLY VERY CURSORILY GLANCED AT THE
20 SUMMARY JUDGMENT MOTION, AND THAT MAY OR MAY NOT BE THE CASE.
21 I HAVEN'T REALLY STUDIED IT ENOUGH TO KNOW. BUT, REGARDLESS,
22 I SUPPOSE IF I DID GRAPPLE WITH ALL OF THIS NOW THEN IT WOULD
23 SAVE YOU A CERTAIN AMOUNT OF TIME AND BOTHER AND PERHAPS
24 PLAINTIFF AS WELL, BUT I JUST DON'T WANT TO ENCOURAGE COUNSEL
25 TO RUN IN HERE ON EX PARTE APPLICATIONS.

1 SO THIS IS WHAT'S GOING TO HAPPEN. THE SUMMARY
2 JUDGMENT MOTION WILL BE REFILED. AND IF YOU HAVE TO TAKE AN
3 EXTRA WEEK OR TWO BEYOND THE MAY 20TH DEADLINE, THEN I'LL
4 EXTEND THE MOTIONS DEADLINE FOR THIS SUMMARY JUDGMENT MOTION
5 FOR THAT PURPOSE, AND ONLY THAT PURPOSE, FOR ANOTHER TWO
6 WEEKS.

7 AND THEN HAVING DONE THAT, ONCE IT'S ON FILE
8 PROPERLY, THEN THE DEFENSE CAN OPPOSE IT ON WHATEVER BASIS
9 THEY THINK APPROPRIATE, INCLUDING THAT THE EVIDENCE OR MUCH
10 OF IT OR MOST OF IT OR ALL OF IT -- OF THE EVIDENCE IN
11 SUPPORT OF IT IS EVIDENCE THAT SIMPLY IS IMPROPER BECAUSE
12 IT'S BASED ON A REPORT FROM AN EXPERT WHO WAS NOT DISCLOSED
13 PURSUANT TO THE SCHEDULING ORDERS THAT THE COURT SET FORTH.

14 ARE THERE ANY QUESTIONS ABOUT ANY OF THIS?

15 MR. BRIGHT: YES, YOUR HONOR, IF YOU DON'T MIND.
16 YOUR HONOR SAID SOMETHING A FEW MOMENTS AGO THAT LEAVES ME IN
17 A QUANDARY AND THAT IS USED THE WORD "REDACTED." THE
18 DOCUMENTS THAT I FILED UNDER SEAL -- WELL, FIRST OF ALL, WE
19 HAVE A PROTECTIVE ORDER IN THE CASE, AS YOUR HONOR KNOWS.

20 THE COURT: AND AS I'M TELLING YOU THE PROTECTIVE
21 ORDER MEANS NOTHING IN REGARD TO FILING SOMETHING UNDER SEAL
22 IN DISTRICT COURT FOR SUMMARY JUDGMENT, ABSOLUTELY NOTHING.

23 MR. BRIGHT: BUT IT HAS A PROVISION IN IT FOR
24 FILING SOMETHING UNDER SEAL WHEN WE FILE PAPERS IN COURT,
25 YOUR HONOR.

1 THE COURT: WHAT I'M TELLING YOU IS INTERRUPTED TO
2 BE THOSE THINGS THAT DIRECTLY RELATE TO WHAT HAS TO BE FILED
3 UNDER SEAL. I'LL REVISE IT FROM NOW ON, BUT WHAT I'M TELLING
4 YOU IS THAT -- AS I SAID, CALIFORNIA LAW, I THINK, IS MUCH
5 BETTER THAN FEDERAL LAW, BUT THE NINTH CIRCUIT CASE LAW IS
6 THIS WAY IS THAT THERE IS A DISTINCTION BETWEEN THAT
7 PROTECTIVE ORDER FOR DISCOVERY PURPOSES AND WHAT IS ALLOWED
8 TO BE FILED UNDER SEAL FOR ADJUDICATORY PURPOSES,
9 PARTICULARLY FOR TRIAL AND SUMMARY JUDGMENT. SO WHAT YOU
10 HAVE TO DO IS FIGURE OUT WHAT DOES THE NINTH CIRCUIT ALLOW
11 YOU TO FILE UNDER SEAL IN REGARD TO A SUMMARY JUDGMENT MOTION
12 AND THEN FILE THAT UNDER SEAL. YOU CAN FILE THE COMPLETE
13 COPY OF YOUR PAPERS UNDER SEAL, BUT AS MUCH OF THOSE PAPERS
14 AS CAN BE PUBLICLY DONE SHOULD BE FILED THEN IN A PUBLIC
15 VERSION. AND THERE'LL JUST BE A GAP OF, LIKE, FOUR
16 PARAGRAPHS. CERTAINLY, WHEN YOU CITE -- SEAL A TEXT, THERE'S
17 NO REASON FOR THAT TO BE FILED UNDER SEAL. THERE'S NO REASON
18 FOR THE GIST OF THE PAPERS OF THE SUMMARY JUDGMENT TO BE
19 FILED UNDER SEAL. SO THERE'LL BE TWO VERSIONS OF THE
20 PAPERS -- THE PUBLIC WHICH ONE IS REDACTED, AND THE ONE UNDER
21 SEAL WHICH ISN'T. I'M ASSUMING THAT THESE DOCUMENTS REALLY
22 ARE APPROPRIATELY FILED UNDER SEAL. MAYBE THEY AREN'T, BUT
23 I'M ASSUMING THAT THEY ARE AND YOU CAN MAKE THAT SHOWING, BUT
24 YOU DO HAVE TO MAKE THAT SHOWING.

25 MR. BRIGHT: I UNDERSTAND, YOUR HONOR'S POINT, I

1 THINK. AND IN PRINCIPLE IT SOUNDS SIMPLE TO APPLY. BUT AS A
2 PRACTICAL MATTER, THE DOCUMENTS THAT I FILED UNDER SEAL ARE
3 PRIMARILY MY OPPONENT'S DOCUMENTS SENT TO ME MARKED "HIGHLY
4 CONFIDENTIAL," OR WHATEVER. SO I FILED THEM -- LEST I DRAW
5 THEIR FIRE -- AS I DO ON EVERYTHING SINGLE THING THAT I DO,
6 THAT I'M IN DISOBEDIENCE OF YOUR ORDER PROTECTING THE
7 CONFIDENTIAL INFORMATION OF MY OPPONENTS. SO IF I FILE THE
8 STUFF NOT UNDER SEAL, THEN I'LL HAVE MOTIONS FROM MR. MELNIK.
9 BELIEVE ME, MR. MELNIK IS LOOKING FOR EVERY OPPORTUNITY TO
10 KNOCK ME OUT OF HIS CASE. SO I'LL GET HIS MOTION SAYING I'M
11 IN VIOLATION OF THE ORDER AND I'M DELIBERATELY TRYING TO
12 EXPOSE HIS CLIENT'S SECRETS TO THE PUBLIC AND ON AND ON. IF
13 THEY WILL STIPULATE TO WHAT STUFF MUST BE FILED UNDER SEAL,
14 THEN I THINK IT WILL BE SIMPLE ENOUGH AND, IF YOUR HONOR WILL
15 SO ORDER, I'LL WORK WITH THEM TO THAT END. I'D LIKE TO GET
16 THIS ON FILE. THIS IS LOGISTICAL AS FAR AS I'M CONCERNED,
17 BUT I DON'T WANT TO HAVE MORE MOTION PRACTICE --

18 THE COURT: I AGREE WITH YOU THAT IT IS LOGISTICAL.
19 LIKE I SAID, I HAVE NO REASON TO THINK THAT THESE DOCUMENTS
20 ARE NOT APPROPRIATELY FILED UNDER SEAL, BUT JUST --

21 MR. BRIGHT: NOR AM I.

22 THE COURT: -- HUMOR ME AND FILE AN EX PARTE
23 APPLICATION AND CITE TO THE NINTH CIRCUIT CASE I'VE ALREADY
24 GIVEN YOU, AND DO NOT SIMPLY RELY ON THE FACT THAT THEY WERE
25 MARKED HIGHLY CONFIDENTIAL.

1 MR. BRIGHT: YES, YOUR HONOR. WELL, THEN I'LL WORK
2 WITH OPPOSING COUNSEL, HOPEFULLY. MR. MELNIK AND I HAVE
3 ENDED UP AT SWORDS' POINTS, UNFORTUNATELY, FOR THE LAST
4 60 DAYS. BUT PERHAPS WE WORK TOGETHER AND GET AGREEMENT ON
5 WHAT REALLY MUST BE UNDER SEAL. I DON'T PARTICULARLY CARE, I
6 JUST WANT TO GET THIS MOTION IN FRONT OF YOUR HONOR SO IT CAN
7 BE HEARD. IT GOES STRAIGHT TO THE HEART OF INFRINGEMENT, MY
8 BURDEN TO PROVE.

9 NOW, I HAVE ONE OTHER THING I NEED TO BRING TO YOUR
10 HONOR'S ATTENTION, AND I REGRET BRINGING IT UP TODAY, BUT MY
11 CLIENT INSISTED I DO SO, IF YOU DON'T MIND. IT'S NOT ON
12 CALENDAR. IF YOU DON'T WANT ME TO, I'LL KEEP MY MOUTH SHUT.

13 THE COURT: WELL, TELL ME WHAT IT IS AND THEN I'LL
14 TELL YOU THAT --

15 MR. BRIGHT: WHEN I TOOK THIS ENGAGEMENT A NUMBER
16 OF YEARS AGO, MY CLIENT'S NAME, AS COLIN HENDRICK (PHONETIC),
17 A MAN; COLIN HENDRICK IS TODAY CHIA HENDRICK (PHONETIC), A
18 WOMAN. AND WITHOUT BURDENING YOUR HONOR WITH THE WHOLE
19 STORY, THE BOTTOM LINE IS THAT COLIN HENDRICK DISCOVERED THAT
20 HE WAS, IN FACT, A FEMALE AT THE MOST BASIC DNA LEVEL; THAT
21 IS TO SAY HE HAS TWO "Y" CHROMOSOMES, AND NO "X" CHROMOSOMES.
22 SO HE HAS BEEN THROUGH SOME RATHER HORRENDOUS SURGERY AND SO
23 ON TO MAKE HIMSELF FEMALE. HIS DEPOSITION -- HER DEPOSITION
24 WAS TAKEN IN THE LAST 10 DAYS AND WILL BE RESUMED IN LATE
25 APRIL PURSUANT TO THE AGREEMENT OF THE PARTIES SO THAT THEY

1 CAN HAVE A FULL AND FAIR SHOT AT DEPOSING HER. SHE TOOK
2 OFFENSE AT SOME OF THE QUESTIONING ASKED, ASSUMING IT WAS SLY
3 AND NASTY INNUENDO.

4 I'M NOT SEEKING ANY PUNISHMENT. I JUST WANT THE
5 COURT TO KNOW THAT COLIN HENDRICK, WHOSE NAME APPEARS ON THE
6 PATENT, IS TODAY CHIA HENDRICK AND SHE IS LIVING HER LIFE AS
7 A FEMALE BECAUSE SHE IS, INDEED, A FEMALE. SO I DON'T WANT
8 THE COURT TO WONDER WHAT IS ALL THIS SLY INNUENDO ABOUT.
9 THERE'S NOTHING SLY ABOUT IT. THERE'S NOTHING SHAMEFUL ABOUT
10 IT. IT IS THE FACT OF THE CASE THAT COLIN HENDRICK LIVED THE
11 LIFE OF A MAN UNTIL SHE DISCOVERED THAT SHE WAS, IN FACT
12 FEMALE.

13 I DON'T THINK THE OTHER SIDE HAS ANY REAL INTENT TO
14 ENGAGE IN SLY JOKES OR -- THERE'S NOTHING HUMOROUS ABOUT IT.
15 THERE'S NOTHING FUNNY ABOUT IT. BUT I WANT THE COURT TO KNOW
16 ABOUT IT JUST SO THAT THE AIR IS CLEAR. AND MY CLIENT HAS
17 ASKED ME TO TELL YOU THIS SO THAT YOU DON'T WONDER WHO'S CHIA
18 HENDRICK AND WHO'S COLIN HENDRICK. THAT'S ALL I HAVE TO SAY
19 ABOUT IT.

20 THE COURT: TWO ISSUES. ONE IS, IF MS. HENDRICK
21 FEELS THAT SHE'S BEING HARASSED THEN, OBVIOUSLY, THAT'S A
22 MATTER FOR -- THE DISCOVERY PROCESS -- THAT'S A MATTER FOR
23 THE MAGISTRATE JUDGE.

24 MR. BRIGHT: I'VE BROUGHT NO MOTION, YOUR HONOR.

25 THE COURT: IN TERMS OF THE DEPOSITION, IT WOULD

1 SEEM TO ME THAT ESPECIALLY -- I DON'T KNOW WHEN THE COURSE OF
2 THE SURGERY WAS -- IF THERE'S GOOD CAUSE FOR THE DEPOSITION
3 TO CONTINUE INTO APRIL, I'M NOT OPPOSED TO THAT, BUT I DO
4 NOTE THAT THE SCHEDULE ORDER CUTS OFF DISCOVERY, I BELIEVE,
5 AS MARCH 29TH. SO IF THERE -- SO SUBMIT A STIPULATION TO
6 ALLOW MS. HENDRICK'S DEPOSITION THEN, AND I'LL SIGN IT. BUT
7 I JUST WANT TO POINT OUT THAT, AS OF RIGHT NOW, I DON'T
8 RECALL RECEIVING THAT STIPULATION.

9 MR. BRIGHT: NOR HAVE WE SENT IT, YOUR HONOR, WE
10 HAVE NOT. BUT I'VE AGREED WITH COUNSEL --

11 THE COURT: SEND IT TO ME AND I'M SURE I WILL SIGN
12 IT.

13 MR. BRIGHT: SHE LIVES OUTSIDE OF CALIFORNIA, FAR
14 OUTSIDE. I'VE AGREED THAT SHE WILL COME BACK IN LATE APRIL
15 AND THEN THEY MAY COMPLETE. THAT'S ALL.

16 I HESITATED TO BRING THIS UP, BUT MY CLIENT
17 INSISTED THAT I TELL YOU SO YOU AREN'T LEFT WONDERING WHO ARE
18 THESE PEOPLE. IT IS ONE IN THE SAME PERSON, COLIN HENDRICK
19 TODAY IS CHIA HENDRICK. END OF STORY.

20 THE COURT: YES, COUNSEL.

21 MR. MELNIK: REAL QUICKLY. WE'LL BE ABLE TO WORK
22 OUT THE ISSUE ON THE DOCUMENTS UNDER SEAL. IN FACT, I THINK
23 IF WE WOULD HAVE HAD A PROPER MEET AND CONFER BEFORE THE
24 MOTION WAS FILED, IT WOULDN'T BE BEFORE YOUR HONOR AT THIS
25 POINT IN TIME.

1 WITH RESPECT TO THE EX PARTE APPLICATION, I JUST
2 WANTED TO RAISE ONE ISSUE. WE BROUGHT IT AS EX PARTE
3 APPLICATION BECAUSE DISCOVERY IS ENDING QUICKLY, AND WE'RE
4 FACED WITH THE DECISION OF WHAT DO WE DO WITH THESE LATE
5 SUBMITTED REPORTS. IN FACT, WE JUST GOT ANOTHER REPORT ON
6 DAMAGES LAST NIGHT. DO WE DEPOSE THESE EXPERTS AND BE IN THE
7 POSITION OF HAVING WAIVED THE FACT THAT THESE REPORTS ARE
8 PREJUDICIAL AND SUBMITTED LATE AND ALL THAT STUFF? DO WE DO
9 OUR OWN REBUTTAL REPORTS AND SUBMIT THEM LATE AS WELL? WE
10 FEEL THAT THIS IS AN ISSUE THAT WE NEEDED TO RAISE AND WE
11 NEEDED TO BRING TO THE COURT'S ATTENTION PROMPTLY BEFORE
12 DISCOVERY CLOSED, BEFORE THAT DEADLINE EXPIRED, AND NOT AWAIT
13 THE SUMMARY JUDGMENT PROCESS AND RAISE IT AS SIMPLY AN
14 OBJECTION TO THE EVIDENCE BECAUSE IT'S A BROADER ISSUE THAN
15 JUST THE IMPACT ON THE SUMMARY JUDGMENT MOTION. IT REALLY
16 IMPACTS HOW WE CLOSE OUT DISCOVERY AND HOW WE FINISH
17 PREPARING OUR CASE AS WE MOVE FORWARD. SO THAT'S THE REASON
18 WE BROUGHT IT THE WAY THAT WE BROUGHT IT. AND I HEAR YOUR
19 HONOR'S GUIDANCE WITH RESPECT TO HOW WE SHOULD ADDRESS IT
20 WITH RESPECT TO THE SUMMARY JUDGMENT MOTION, BUT I FEEL THAT
21 WE STILL HAVE THIS BROADER ISSUE ABOUT POTENTIAL HOBSON'S
22 CHOICE WE'RE FACING OF WHICH RIGHTS DO THE DEFENDANTS WAIVE
23 WITH RESPECT TO THESE REPORTS.

24 THE COURT: ALL RIGHT. I WILL TAKE THE MATTER OF
25 THE EX PARTE APPLICATION TO WHICH A WRITTEN OPPOSITION HAS

1 BEEN FILED UNDER SUBMISSION, AND IF I DENY IT AND YOU NEED
2 ADDITIONAL TIME TO PURSUE EITHER -- I HEAR THE POINT THAT
3 YOU'RE MAKING. SO IF I DENY IT, THEN I'LL -- YOU'LL KNOW
4 WHAT TO DO AND IF YOU NEED ADDITIONAL TIME TO DEPOSE THESE
5 EXPERTS WHO ARE LATELY BEING DONE, I'LL TELL YOU TO WORK OUT
6 A STIPULATION AND THE PARTIES CAN BE REASONABLE ABOUT THAT,
7 THE SAME WAY THEY ARE WITH MS. -- I'M SORRY -- IT WAS?

8 MR. BRIGHT: HENDRICK.

9 THE COURT: MR. HENDRICK'S RENEWED DEPOSITION OR
10 MAYBE THAT SINCE HAVING A WRITTEN OPPOSITION, I'LL LOOK AT
11 BOTH OF THEM AND IF I -- MAYBE I'LL DENY IT AND THEN,
12 OBVIOUSLY, YOU ARE IN THE SAME PLACE, OR IF I GRANT IT, THEN
13 YOU WON'T HAVE TO WORRY ABOUT IT. I SEE THE POINT THAT
14 YOU'RE RAISING.

15 MR. BRIGHT.

16 MR. BRIGHT: YES, YOUR HONOR. THANK YOU. SORRY TO
17 COME BACK TO THE PODIUM.

18 THIS WEDNESDAY, TWO DAYS FROM NOW, WE HAVE
19 SCHEDULED -- THE OTHER SIDE HAS NOTICED AND I'VE AGREED TO
20 PRODUCE MR. GUSSIN TO TESTIFY AS THE 30(B)(6) WITNESS ON THE
21 SUBJECTS OF VALIDITY AND INFRINGEMENT. HE'S ALSO MY EXPERT
22 ON THE SUBJECT OF VALIDITY AND INFRINGEMENT. HE IS MY WHOLE
23 CASE ON VALIDITY AND INFRINGEMENT, AS PRACTICAL MATTER,
24 EXCEPT WHAT I MAY ABSTRACT FROM MY OPPONENTS IN MY OWN
25 30(B)(6) DEPOSITIONS WHICH ARE ALSO SUPPOSED TO TAKE PLACE

1 AFTER THE CUTOFF DATE, WHICH WE HAVE AGREED TO.

2 SO I HAVE AGREED TO PRODUCE MR. GUSSIN AND I HAVE
3 DONE SO IN PART TO MITIGATE -- MITIGATE -- TO DISSIPATE THE
4 ALLEGATION THAT THEY HAVEN'T HAD A FULL AND FAIR OPPORTUNITY
5 TO TAKE DISCOVERY ON THE SUBJECT OF OUR CASE. THEY WILL HAVE
6 A FULL AND FAIR OPPORTUNITY IF THEY JUST TAKE HIM UP ON
7 WEDNESDAY AND ASK HIM THE QUESTIONS.

8 THE COURT: WELL, LET ME SAY THIS. IN REGARD TO
9 THE EX PARTE -- AND I'VE ONLY GLANCED AT IT ENOUGH TO GET THE
10 GIST OF WHAT IT WAS AND THEN FELT THAT IT OUGHT TO JUST BE
11 DEALT WITH IN THE THEME OF THE SUMMARY JUDGMENT. AND I KNOW
12 THAT YOUR OPPOSITION EXISTS, BUT I HAVEN'T READ IT YET. IN
13 YOUR OPPOSITION IF, IN FACT, HE IS YOUR WHOLE CASE, DO YOU
14 HAVE AN EXPLANATION AS TO WHY HE WAS NOT DESIGNATED IN A
15 TIMELY FASHION?

16 MR. BRIGHT: I DO. MY PAPERS EXPLAIN IT AS BEST I
17 CAN DO. BUT I'M JUST SAYING A DEPOSITION ON WEDNESDAY
18 IS MORE THAN A TRIVIAL EXPENSE IN THIS CASE. AND I'M
19 FULLY -- ONE OF THE REASONS THAT I SCHEDULED THIS DEPOSITION
20 AND AGREED TO BRING MS. HENDRICK ALL THE WAY BACK TO
21 CALIFORNIA FOR ANOTHER SESSION DEPOSITION, NOTWITHSTANDING
22 THE WASTEFUL TIME THAT MY OPPONENTS DID IN HER FIRST SESSION
23 OF DEPOSITION IS TO DISSIPATE THIS WHOLE PHONY-BOLONEY
24 ARGUMENT THAT THEY'VE SUFFERED SOME KIND OF PREJUDICE. THEY
25 HAVEN'T SUFFERED A BLOODY THING. BY GIVING THEM ALL THE

1 CHANCES TO TAKE THE DEPOSITION AND AGREEING TO CONTINUE THE
2 TRIAL UNTIL THE YEAR 2020 OR WHATEVER, I'VE TRIED TO MITIGATE
3 WHATEVER SO-CALLED HARM HAS HAPPENED. THAT'S SUPPOSEDLY WHAT
4 WE'RE SUPPOSED TO DO UNDER FEDERAL RULES IF SOMEONE HAS
5 REALLY BEEN PREJUDICED. AND WE'RE MONTHS FROM TRIAL, IF WE
6 EVEN GET STARTED IN SEPTEMBER. WE CAN CONTINUE THE TRIAL SIX
7 MONTHS, AS FAR AS I'M CONCERNED, TO DISSIPATE. THEY CAN TAKE
8 DEPOSITIONS FOR WEEKS ON END. YOUR HONOR MAY IMPOSE OTHER
9 PENALTIES; FINE ME MONEY, THROW MY MOTIONS OUT, WHATEVER YOU
10 WANT TO DO. BUT FOR GOODNESS SAKE, LET'S NOT GUT THE CASE ON
11 SOME TECHNICALITY WHEN THE OTHER SIDE WILL HAVE EVERY
12 OPPORTUNITY TO TAKE THE DISCOVERY.

13 THE COURT: I HAVE NOT READ YOUR EXPLANATION YET
14 AND I WILL CERTAINLY DO SO AND GIVE IT CAREFUL CONSIDERATION.
15 I DON'T THINK OBEYING THE SCHEDULING ORDER, ESPECIALLY WHEN I
16 PREVIOUSLY GRANTED CONTINUANCES; AND, ULTIMATELY, THEY WERE,
17 MORE OR LESS, SELECTED BY THE PARTIES IN THE FIRST PLACE.
18 I'M NOT GOING TO HAVE THAT CHARACTERIZED AS A TECHNICALITY.
19 IT'S NOT A TECHNICALITY. UNDER RULE 16 YOU MIGHT HAVE GOOD
20 CAUSE FOR NOT HAVING MET IT AND FOR RETROACTIVELY TRYING TO
21 HAVE IT EXTENDED, BUT IT WAS AND IS NOT A TECHNICALITY.

22 COUNSEL.

23 MR. MELNIK: AND IT'S MORE THAN JUST NOT A
24 TECHNICALITY. IN FACT, IT IS HIGHLY PREJUDICIAL TO US
25 BECAUSE THE COURT HAD SET A BALANCED, FAIR APPROACH TO

1 DISCLOSURE OF EXPERTS, WHERE PARTIES WILL SIMULTANEOUSLY
2 DISCLOSE THOSE EXPERTS AND THEIR OPINIONS, THEIR REPORTS FOR
3 THOSE ISSUES THAT THEY HAVE THE BURDEN OF PROOF ON. AND THEN
4 A MONTH LATER, WE COME BACK AND WE DO REBUTTAL REPORTS. WE
5 FOLLOWED THOSE RULES AND WE BARED OUR THEORIES AND OUR
6 APPROACHES TO THIS CASE TO THE PLAINTIFF, AND WE DIDN'T GET
7 ANYTHING BACK, INCLUDING STUFF THAT THEY KNEW WAS COMING IN
8 TERMS OF REBUTTAL. WE GAVE THEM AN INVALIDITY REPORT.
9 NOTHING. WE DIDN'T HEAR ANYTHING. THERE WAS NO WORD THAT
10 THEY WEREN'T GOING TO BE ABLE TO DO IT.

11 NOW, IN THEIR PAPERS THEY MAKE THIS ARGUMENT THAT
12 IT'S BECAUSE OF PRODUCTION DELAY, BUT THE PRODUCTION DELAY IS
13 OF THEIR OWN MAKING. NOW, WE HAD AGREED TO A PROTECTIVE
14 ORDER BACK IN AUGUST, AND THEY WITHDREW THEIR AGREEMENT TO
15 THAT PROTECTIVE ORDER AND FORCED US TO FILE A MOTION WITH
16 MAGISTRATE JUDGE WISTRICH, WHO, AT THE OUTSET OF THAT
17 HEARING, EXPRESSED SURPRISE THAT THE PLAINTIFF WASN'T
18 AGREEING TO THE PROTECTIVE ORDER THAT WE WERE ASKING FOR.
19 THEY WANTED THEIR C.E.O., HEAD OF RESEARCH AND DEVELOPMENT,
20 INVENTOR ON THE PATENT TO HAVE ACCESS TO THE DEFENDANT'S
21 HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY MATERIAL. AND WE
22 SAID, "NO, THAT'S NOT APPROPRIATE. YOU GUYS ARE OUR
23 COMPETITOR. WE WOULD NEVER GIVE THAT TO YOU." AND
24 MAGISTRATE JUDGE WISTRICH AGREED, SAID "NO, THAT'S NOT
25 APPROPRIATE."

1 SO ANY DELAY IN PRODUCTION COULD HAVE BEEN AVOIDED
2 HAD THEY SIMPLY AGREED TO THE STANDARD PROTECTIVE ORDER IN
3 THIS CASE. THERE WAS NO GOOD REASON TO FORCE US TO HAVE TO
4 GO TO MAGISTRATE JUDGE WISTRICH.

5 FURTHERMORE, ALL OF OUR REPORTS ARE BASED ON
6 PUBLICLY AVAILABLE INFORMATION. THEIR INFRINGEMENT THEORY IS
7 BASED ON PUBLICLY AVAILABLE INFORMATION.

8 MS. HENDRICK JUST LAST WEEK SAID, I'M ACCUSING THE
9 NEV SYSTEM -- IT'S THE NEV SPECIFICATIONS THAT CAUSED THIS
10 INFRINGEMENT. THOSE SPECIFICATIONS ARE PUBLICLY AVAILABLE.
11 THEY'RE ON THE WEBSITE. WE PRODUCED THEM BACK IN 2012. THEY
12 HAD EVERYTHING THEY NEED. AND THEN LAST NIGHT WE GET THIS
13 DAMAGES REPORT BASED ON DOCUMENTS FROM 2011, PUBLIC DOCUMENTS
14 FROM 2011. THERE'S NO REASON WHY IT HAD TO DELAY UNTIL LAST
15 NIGHT FOR THEM TO DO THESE REPORTS. FROM MY PERSPECTIVE, IT
16 LOOKS LIKE THEY'RE TRYING TO GET A TACTICAL ADVANTAGE BY
17 WAITING FOR US TO EITHER GIVE THEM A REPORT, ASK QUESTIONS IN
18 DEPOSITIONS ABOUT THE DAMAGES THEORY AND HOW THEY'RE GOING
19 PROVE IT AND TELEGRAPH THEM ON HOW WE'RE GOING TO TRY TO
20 UNDERCUT IT, AND THEN TURN AROUND AND GIVE US A REPORT AND
21 SAY, "HERE'S MY EXPERT, HERE ARE MY OPINIONS." AND THAT IS
22 PATENTLY UNFAIR IN THIS CASE. AND THAT'S WHY WE THINK THE
23 MOTION WAS APPROPRIATE AND WE THINK THAT CHARACTERIZING IT AS
24 A TECHNICALITY AND WE THINK THE SANCTION THAT WE'RE ASKING
25 FOR IS ABSOLUTELY APPROPRIATE BECAUSE, OTHERWISE, WE'RE GOING

1 TO BE SEVERELY PENALIZED SIMPLY FOR FOLLOWING THE COURT'S
2 RULES.

3 MR. BRIGHT: WELL, A HALF-TRUTH, UNFORTUNATELY.
4 THE FIRST MOTION WAS BEFORE JUDGE OLGUIN WHO GRANTED MY
5 MOTION, GRANTED IT.

6 THE COURT: AND YOU MADE THAT CLEAR IN YOUR PAPERS
7 WHEN YOU ASKED FOR --

8 MR. BRIGHT: AND THEN HE WAS PROMOTED AND THEY
9 REFILED THE SAME MOTION WITH THE SAME EVIDENCE AND WISTRICH
10 CHOSE TO OVERRULE JUDGE OLGUIN. THE BOTTOM LINE IS I DIDN'T
11 GET ANY OF THEIR DOCUMENTATION UNTIL MID FEBRUARY OF THIS
12 YEAR AND NOTHING ON DAMAGES UNTIL THE BEGINNING OF MARCH OF
13 THIS YEAR. SO I COULDN'T VERY WELL WRITE A REPORT ABOUT
14 PAPERS I DIDN'T HAVE. NOW, THEIR ASSERTION THAT OR
15 INFRINGEMENT IS BASED ON PUBLICLY AVAILABLE DOCUMENTS IS
16 UNTRUE; OTHERWISE, I WOULDN'T HAVE FILED MY MOTION UNDER SEAL
17 AND FILED THE DOCUMENTS THAT I GOT IN MID FEBRUARY UNDER
18 SEAL. THEY'RE MARKED CONFIDENTIAL, AND HIGHLY CONFIDENTIAL.
19 OPPOSING COUNSEL WOULDN'T GIVE THEM TO ME WITHOUT A
20 PROTECTIVE ORDER REPORT IN PLACE BEFORE THE YEAR END.

21 MEANWHILE, THEIR DAMAGES FELLOW WROTE A REPORT ON
22 THE VERY DOCUMENTS THEY WITHHELD. AND WHEN THEY PRODUCED THE
23 DOCUMENTS THEIR EXPERT RELIED UPON, THEY WERE IN A PILE THAT
24 HAD ONE-AND-A-HALF MILLION OF PIECES OF PAPER. THE FACT THAT
25 MR. GUSSIN AND I WERE ABLE TO GO THROUGH THAT

1 MILLION-AND-A-HALF PAPERS AND FIND THE RELEVANT DOCUMENTS
2 WHICH, OF COURSE, THEIR EXPERT HAD IN DECEMBER IS NOTHING
3 SHORT OF MIRACULOUS. I WORKED HARDER IN THAT TWO-WEEK PERIOD
4 THAN I'VE WORKED PROBABLY IN TEN YEARS, BUT I COULDN'T DO IT
5 WITHOUT DOCUMENTS AND THEY WITHHELD THEM WHILE GIVING THEM TO
6 THEIR EXPERT TO WRITE HIS REPORT. NOW, I CAN'T THINK OF
7 ANYTHING UNFAIR TO OUR SIDE, NEVER MIND THE FACT THAT IF THE
8 COURT IS TO CONSIDER A PENALTY, THE PENALTY CERTAINLY
9 SHOULDN'T BE THE DESTRUCTION OF OUR CASE. THE CASE LAW SAYS
10 THE COURT MAY AND SHOULD TAKE INTO ACCOUNT FAR LESSER
11 PENALTIES -- CONTINUANCES, FINANCIAL FINES ON ME, WHATEVER
12 YOUR HONOR THINKS APPROPRIATE. BUT TO THROW US OUT OF COURT
13 WOULD BE DRACONIAN UNDER CIRCUMSTANCES WHEN THEY HAVE
14 PROFITED FROM THEIR OWN WITHHOLDING OF THE DOCUMENTS AND
15 WRITTEN REPORTS IN REBUTTAL TO A REPORT I HADN'T EVEN
16 WRITTEN. SO I'D ASK YOUR HONOR TO PLEASE LOOK AT THIS VERY
17 CAREFULLY. THIS IS SERIOUS STUFF AS FAR AS I AM CONCERNED.
18 IT'S A CRISIS FOR US BECAUSE, IF YOU TAKE OUR EXPERTS AWAY,
19 OUR CASE IS GUTTED. LET ME BE CANDID: OUR CASE IS GUTTED.

20 THE COURT: I'M SURE THAT IT IS SET FORTH IN YOUR
21 OPPOSITION. I'LL KEEP IT IN MIND, BUT I WILL SAY THAT IF IT
22 WAS A MATTER THAT DIRE, THEN IT WOULD HAVE BEEN APPROPRIATE
23 WHEN THE ORIGINAL DEADLINE WAS RAISING TO HAVE COME IN AND
24 SAID, "UNDER RULE 16, I SIMPLY CANNOT DESIGNATE EXPERTS NOW,"
25 AND NOT TRY TO DO IT AFTER THE FACT.

1 COUNSEL.

2 MR. MELNIK: A COUPLE OF POINTS TO MAKE, AND I'M
3 NOT GOING TO TRY AND UNWIND THAT WHOLE THING. FIRST OFF, THE
4 FIRST SUBMISSION THAT WAS FILED, JUDGE OLGUIN SIMPLY SAID,
5 LOOK, THERE'S NOT ENOUGH FACTUAL SUPPORT; I CAN'T UNDERSTAND
6 WHAT THE DOCUMENTS AT ISSUE ARE HERE, REFILE YOUR MOTION.
7 THAT'S ALL THAT WAS SAID. THERE WASN'T A DENIAL OR AN
8 ACCEPTANCE OF ONE POSITION OR ANOTHER. HE SIMPLY SAID,
9 THERE'S JUST NOT ENOUGH HERE. REFILE IT WITH THE PROPER
10 DECLARATIONS.

11 AND THE SECOND POINT THAT NEEDS TO BE MADE IS THE
12 DEFENDANTS HAVEN'T DONE A DAMAGES EXPERT REPORTS. WE DON'T
13 EVEN KNOW WHAT THEIR THEORIES ARE. WE DIDN'T DO A REBUTTAL.
14 I'M NOT SURE WHAT REPORT PLAINTIFF'S COUNSEL IS SPEAKING OF,
15 BUT NO SUCH REPORT WAS DONE BY US. SO I JUST WANTED TO MAKE
16 SURE THAT THE RECORD WAS CLEAR ON THAT. WE DIDN'T DO
17 ANYTHING LIKE THAT.

18 WE DID PRODUCE ALL THE DOCUMENTS THEY ASKED FOR.
19 NOW I'M HEARING THERE WERE TOO MANY DOCUMENTS, BUT THAT'S --
20 THEY ASKED FOR A LOT OF DOCUMENTS. WE GIVE THEM WHAT WE HAD.

21 THE LAST THING IS THEY GOT TENS OF THOUSANDS OF
22 PAGES OF THOSE DOCUMENTS BEFORE THE PROTECTIVE ORDER WAS EVEN
23 ENTERED INTO. PUBLICLY AVAILABLE DOCUMENTS THAT WE FELT
24 COULD NOT BE DESIGNATED AS EITHER CONFIDENTIAL OR HIGHLY
25 CONFIDENTIAL, WE PRODUCED TO THEM WITHOUT THE PROTECTIVE

1 ORDER; WE PRODUCED TO THEM BEFORE IT EVEN WENT TO JUDGE
2 WISTRICH BECAUSE THEY'D ASKED FOR THEM.

3 SO FOR PLAINTIFFS TO NOW SUGGEST THAT NOT UNTIL
4 MARCH OR EVEN THE END OF MARCH WITH RESPECT TO THE DAMAGES
5 DOCUMENTS COULD THEY HAVE DONE THESE REPORTS IS JUST NOT
6 CONSISTENT WITH THE FACTS OF THIS CASE.

7 THE COURT: ALL RIGHT. THE EX PARTE APPLICATION IS
8 SUBMITTED.

9 (END OF PROCEEDINGS.)

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CERTIFICATE OF REPORTER

I, ROSALYN ADAMS, OFFICIAL COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/S/ ROSALYN ADAMS